Supreme Court, U.S.
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No. 02-297

In the Supreme Court of the United States

SHANNON T. DOYLE,
Petitioner,

v.

HYDRO NUCLEAR SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT HYDRO NUCLEAR SERVICES, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a standard authorization form allowing a prospective employer to gather background information regarding prospective employees, as part of a security screening process for all potential employees seeking unescorted access to a nuclear power plant, did not waive employees' rights under the whistleblower protection provisions in Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851.

2. Whether the court of appeals correctly held (a) that an employer cannot be liable under the ERA in the absence of any evidence of the employer's discriminatory intent; (b) that the Secretary of Labor entirely failed to address the discriminatory intent issue; and (c) that petitioner failed to carry his evidentiary burden in that regard.

PARTIES TO THE PROCEEDING

1. Respondent Hydro Nuclear Services, Inc. ("Hydro") was a petitioner in the court below.

2. Petitioner Shannon T. Doyle was the complainant in the proceedings before the Department of Labor and a petitioner in the court below.

3. The United States Department of Labor, the Secretary of Labor, and the Department of Labor Administrative Review Board, were respondents to the petitions for review filed by Hydro and Mr. Doyle below.

CORPORATE DISCLOSURE STATEMENT

Respondent Hydro Nuclear Services, Inc. ("Hydro") no longer exists as a separate entity. In the late 1980s, Hydro became part of Westinghouse Radiological Services, Inc. ("Radiological Services"), a wholly owned subsidiary of Westinghouse Electric Corporation ("WELCO"). On March 8, 1990, Radiological Services changed its name to Westinghouse Staffing Services, Inc. ("Staffing Services"). On December 1, 1997, WELCO changed its name to CBS Corporation ("CBS").

On March 22, 1999, CBS transferred its ownership of Staffing Services to Westinghouse Electric Company LLC ("WEC"). WEC is a wholly owned subsidiary of British Nuclear Fuels plc. Neither British Nuclear Fuels plc nor WEC is a publicly traded company. Staffing Services itself was dissolved on July 12, 1999.

WEC posted a $1.25 million bond on Hydro's behalf in the United States District Court for the Western District of Pennsylvania, and thus WEC has a financial interest in the outcome of this litigation. WEC posted the bond as a condition of that court's stay of Mr. Doyle's action to enforce the monetary award at issue in this case.

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BRIEF FOR RESPONDENT HYDRO NUCLEAR SERVICES, INC. IN OPPOSITION

Respondent Hydro Nuclear Services, Inc. ("Hydro") submits this brief in response to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 285 F.3d 243. The final decision of the Administrative Review Board on damages is unreported, but can be found at 2000 DOL Ad. Rev. Bd. LEXIS 49. The final decision of the Secretary of Labor as to liability (Pet. App. A29-A35) is unreported, but can be found at 1994 WL 897315 (DOL Off. Adm. App.). The decision of the Department of Labor Administrative Law Judge granting Hydro's motion for summary judgment (Pet. App. A38-A44) is unreported. These and other opinions and orders in this case

are available in the Whistleblower Collection of the Department of Labor Office of Administrative Law Judges online Law Library, at http://www.oalj.dol.gov/public /wblower/ refrnc/eralist2.htm (docket no. 89-ERA-22).

STATEMENT OF THE CASE

A. Authorization for Unescorted Access to Nuclear Power Plants

This case arises from Hydro's decision not to hire Mr. Doyle for a six-week temporary employee position because he refused to sign a standard form allowing Hydro to conduct a background investigation prior to granting him unescorted access to the D. C. Cook nuclear power plant in Bridgman, Michigan. At the time it attempted to hire Mr. Doyle, Hydro was in the business of providing temporary workers to assist in the decontamination and maintenance of nuclear power plants. Pet. App. A3. As a contractor serving entities licensed to operate nuclear plants, Hydro bore a substantial responsibility for safeguarding public health and safety by ensuring that its temporary workers satisfied the security requirements for access to the nuclear plants to which Hydro sent them. Pet. App. A44.

Given the serious public safety and security issues associated with clearing persons for unescorted access to nuclear power plants, Hydro developed standard screening procedures in accordance with statutory and regulatory guidelines. These "access authorization" procedures are designed to control access to the protected areas of nuclear facilities. Seeking to develop a uniform set of standards, in 1984, the Nuclear Regulatory Commission ("NRC") issued a proposed rule to formalize access authorization programs.[1] On March

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[1] Access Authorization Program, 49 Fed. Reg. 30726 (Aug. 1, 1984). Congress delegated to the NRC broad authority to regulate the operation of nuclear power plants. *See, e.g.*, 42 U.S.C. § 2201; 42 U.S.C. § 5841(f).

9, 1988, the NRC issued a policy statement setting forth industry-proposed guidelines, which sought "to ensure that individuals who require unescorted access to protected areas or vital areas of [nuclear] facilities are trustworthy, reliable, emotionally stable, and do not pose a threat to commit radiological sabotage."[2] The guidelines provided for background checks and psychological evaluations. 53 Fed. Reg. 7536.

Accordingly, Hydro's standard screening procedures required applicants to undergo a drug test, a psychological evaluation, a physical examination, and a thorough investigation of their prior employment, their medical and educational background, and their military and criminal records, if any. These requirements were consistent with the guidelines set forth in the NRC's Policy Statement (now codified as an NRC regulation), which require a background investigation sufficient to establish "an individual's true identity, and [to] develop information concerning an individual's employment history, education history, credit history, criminal history, military service, and [to] verify an individual's character and reputation." 10 C.F.R. § 73.56(b)(2)(i); 53 Fed. Reg. 7538-39.

To facilitate its background investigations of those requiring unescorted access, Hydro required all applicants to sign a form entitled "Authorization for Release of Information and Records." Pet. App. A4, A18. The authorization allowed a wide variety of entities—including federal, state, and local government agencies, schools, doctors, hospitals, credit organizations, criminal justice agencies, and former employ-

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Establishing safety standards is a primary mandate within that delegation of power. *See, e.g.*, 42 U.S.C. § 2133(b).

[2] Nuclear Power Plant Access Authorization Program; Policy Statement, 53 Fed. Reg. 7534, 7534-35 (March 9, 1988). On April 25, 1991, the NRC promulgated a final rule at 10 C.F.R. § 73.56 (1991) based on the guidelines contained in the Policy Statement.

ers—to provide information about the applicants to Hydro, which then used that information to evaluate the applicants' "eligibility for clearance, allowing unescorted access to Nuclear Power Stations, as required by Government regulations."[3] Pet. App. A45.

The form released Hydro and the entities providing information from liability for "furnishing or receiving" information pursuant to the authorization.[4] Pet. App. A4-A5, A15, A45. It did not suggest that the applicant released Hydro or anyone else from liability under the whistleblower provisions of the Energy Reorganization Act ("ERA").

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[3] Mr. Doyle's petition asserts that Hydro failed to demonstrate that "it ever proffered a similar prospective waiver to other employment candidates." Pet. 6 n.4. But Mr. Doyle has never argued or presented evidence that the release was somehow special to him. As the court of appeals correctly observed, Mr. Doyle never claimed that Hydro treated him differently from other applicants. Pet. App. A4. The court of appeals further commented that "the record makes clear that Hydro furnished the authorization to all applicants for temporary positions," and the Secretary took no issue with the proposition that Hydro "routinely uses the form for screening all applicants." Pet. App. A18, A36; *see also* Pet. App. A43 (Recommended Decision and Order of the Administrative Law Judge referring to the "standard release form"). Mr. Doyle does not seek review of the determination that the form he was asked to sign was a standard authorization and release form presented to all potential employees.

[4] The Authorization for Release of Information and Records, which is reprinted in full in the appendix to the petition, provided in part as follows:

> Further, I hereby release and discharge Hydro Nuclear Services, their [*sic*] representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results [*sic*] of furnishing or receiving such information pursuant to this authorization.

Pet. App. A4-A5, A45.

Indeed, the form did not even mention the ERA.[5] Pet. App. A16; *see* Pet. App. A45. The authorization did contain an explicit reference to the Privacy Act, 5 U.S.C. § 552a, which is consistent with the form's limited purpose of waiving potential claims for privacy infringement. Pet. App. A4, A16, A45.

B. Mr. Doyle's Employment Application

In the fall of 1988, Hydro recruited Mr. Doyle to work as a temporary senior decontamination technician during a planned outage at the D. C. Cook nuclear power plant. Pet. App. A3-A4. Had he been hired, Mr. Doyle would have earned $6.50 per hour, plus a per diem allowance and extra pay for overtime, for the six-week period of the D.C. Cook outage. Pet. App. A4.

As part of its routine screening process, Hydro required Mr. Doyle to take a series of psychological and drug tests and to complete a routine employment application that included Hydro's standard release form. Despite the limited nature of the release, Mr. Doyle crossed out the second paragraph before signing it. Pet. App. A41. Upon learning that Mr. Doyle refused to sign the unaltered form, Hydro's Manager of Employee Relations, Robert Booker, explained to Mr. Doyle that Hydro needed a signed, unaltered release in order to perform the required background check. JA 191.[6] Mr. Booker further explained that all prospective employees were required to sign the form, which was an integral part of the

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[5] At the relevant time, the whistleblower protection provisions were contained in Section 210 of the Energy Reorganization Act of 1974, as amended. Pub. L. No. 95-601, § 210, 92 Stat. 2947, 2951 (1978). In 1992, Congress amended Section 210 and redesignated it as Section 211. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, §2902, 106 Stat. 2776, 3123 (1992). Section 211 is codified at 42 U.S.C. § 5851 (1994).

[6] "JA" refers to the parties' Joint Appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

pre-employment screening process necessary to obtain security clearance for unescorted access to the plant, and that Mr. Doyle's refusal to sign the form would prevent Hydro from hiring him. *Id.* at 191-92.

Mr. Doyle then mentioned that he had been involved in a "whistleblower incident" with a previous employer. Pet. App. A42. This was the first that Mr. Booker had heard of this incident, and he did not question Mr. Doyle about its details. JA 192; Pet. App. A5. Mr. Booker explained that Hydro's only interest in requiring the signed release was to enable it to complete the background investigation so that Mr. Doyle could obtain security clearance for unescorted access to the plant. JA 191-92; Pet. App. A5; *see also* JA 183-84. Mr. Doyle refused to sign the release, and Hydro did not hire him. *Id.*[7]

Notwithstanding Mr. Doyle's refusal to sign its authorization form, Hydro paid him the $48.00 per diem for the entire 15 days that he spent in Michigan. Pet. App. A5-A6. Hydro also reimbursed Mr. Doyle for the cost of his travel between Michigan and his home in Alabama. *Id.*; Pet. App. A40, A42.

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[7] The petition asserts that Mr. Doyle also expressed a concern regarding potential "blacklisting" to Dan Haynes, another Hydro employee. *See* Pet. 4. The sole support cited for this claim is Mr. Doyle's initial complaint to the Wage and Hour Division. The complaint, however, does not support the statement in the petition that Mr. Doyle discussed "blacklisting" with Mr. Haynes. According to the complaint, Mr. Doyle merely stated that he would file a complaint with the Department of Labor if Hydro maintained that the initial results of Mr. Doyle's drug screen—which yielded a positive result—were accurate, even if his subsequent test was negative. Pet. App. A53. Mr. Doyle's complaint also alleges that he informed a Mr. McCormick of his "previous whistleblower status," in the context of discussing the drug tests. *Id.* That allegation also did not mention "blacklisting." In any event, Mr. Doyle does not even suggest that either of these conversations was relayed to Mr. Booker, the Hydro manager with whom Mr. Doyle discussed the authorization and release form at issue in this case.

C. Proceedings Before the Department of Labor

On December 9, 1988, Mr. Doyle filed a complaint with the Wage and Hour Division of the United States Department of Labor, alleging that Hydro violated the Energy Reorganization Act by refusing to hire him unless he signed Hydro's standard authorization form. Pet. App. A51-A56. Hydro filed a response to the complaint on January 26, 1989.[8]

The Wage and Hour Division determined that Mr. Doyle's complaint should be dismissed because "all evidence indicates that Hydro Nuclear Services, Inc. terminated [Mr. Doyle's] employment solely because of [his] refusal to sign the firm's standard Privacy Act waiver form and not because of [his] prior admitted whistleblower activities." Pet. App. A6; JA 186. Mr. Doyle requested a hearing before an Administrative Law Judge.

On cross motions for summary judgment, the ALJ held that Hydro did not violate the ERA by discontinuing consideration of Mr. Doyle's employment application when he refused to

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[8]Hydro's answer—in the form of a letter from Mr. Booker responding to the complaint letter from Mr. Doyle (JA 182-185)—was not included in the administrative record compiled by the Department of Labor because, although it was submitted to the Wage and Hour Division, it was not separately presented to the Administrative Law Judge. Instead, Hydro's written submission to the ALJ (JA 189-201) relied on and summarized the points made in the Booker letter. Because it is undisputed that the Booker letter was submitted to the Wage and Hour Division in January 1989, shortly after Mr. Doyle's complaint, Hydro moved in the court of appeals to supplement the administrative record by adding the Booker letter. Although petitioner now disparages the Booker letter as "self-serving and untested" (Pet. 6 n.4), it stands on the same footing as Mr. Doyle's complaint letter, on which the petition relies. *See* Pet. 4. Moreover, the substance of the Booker letter—including the routine nature of the authorization form—was set forth in Hydro's pre-hearing statement before the ALJ, which undeniably was part of the administrative record. After the court of appeals issued its decision in Hydro's favor, the court denied Hydro's motion to supplement the administrative record.

sign Hydro's standard authorization form.[9] In his Recommended Decision and Order, dated July 17, 1989, the ALJ explained that Mr. Doyle's refusal to sign the release was not protected by the ERA because signing the release would not have waived any rights under the statute. Pet. App. A44. The ALJ expressly agreed with Hydro's interpretation that "the release is extremely narrow and only applies to that which flows from the act of turning over records to the Respondent. It does not release anyone from any illegal acts under the ERA or Atomic Energy Act." Pet. App. A43 (quoting Hydro's countermotion for summary decision). The ALJ also concluded that it was not improper for Hydro to require applicants to release it and other entities from liability for turning over records:

> [Hydro] had a right to require all prospective employees to sign such a release in order to obtain all necessary information pertaining to an individual's post [*sic*] record. Since [Mr. Doyle] refused to accept this requirement I find that [Hydro] had a legal right to refuse to employ [Mr. Doyle]. Employers who hire workers for nuclear power plants must ensure the health and safety of the public by carefully screening all prospective employees. [Hydro] in requiring all employees including [Mr. Doyle] to sign its release was exercising an essential step in performing its duty of responsible investigation and screening of employees.

Pet. App. A44. The ALJ's recommendation that the complaint be dismissed was forwarded to the Secretary of Labor for a final decision.

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[9] In his petition, Mr. Doyle inaccurately states that this case was decided on a "stipulated record." Pet. 7. Although the parties stipulated to certain facts before the ALJ (*see* Pet. App. A40-A42), there was never any agreement that these were the only facts relevant to this case. Indeed, Mr. Doyle does not limit his own statement of facts to those contained in the parties' stipulation. *See, e.g.*, Pet. 4 (citing Mr. Doyle's complaint to the Wage and Hour Division).

After nearly five years of inactivity, the Secretary summarily rejected the ALJ's analysis and recommendation, and held that Hydro violated the ERA by refusing to hire Mr. Doyle. Pet. App. A35. Although he concluded that the language of the Authorization for Release of Information and Records was ambiguous, and observed that "[e]ven lawyers can disagree over [its] scope and effect," the Secretary nonetheless construed the form to be a waiver of an applicant's ERA rights. Pet. App. A31-32, A36 n.1. At the same time, the Secretary recognized that any such waiver would be unenforceable as a matter of public policy. Pet. App. A33.

The Secretary did not address the issue whether Hydro's decision to discontinue consideration of Mr. Doyle's application was motivated by any discriminatory intent, and instead focused solely on what he considered to be the proper interpretation of the authorization form. Pet. App. A19 n.16. In doing so, the Secretary did not attempt to explain why he believed the ALJ's interpretation was incorrect. He did not take any evidence that might have put him in a better position than the ALJ to discern the meaning of the release. Instead, the Secretary merely proclaimed that "[g]iving the authorization form its most narrow reading, it would release Respondent and any other employer from whom Respondent obtained information about Complainant from any claim that the information had been provided or used to deny Complainant employment because of protected activities under the ERA." Pet. App. A31.

The Secretary apparently found it necessary to alter the phrasing of the release in order to reach his result. The document itself limits the release of liability to that which results from "*furnishing or receiving*" information. Pet. App. A45 (emphasis added). To conclude that the release applied to claims of illegal blacklisting, however, the Secretary characterized the release as extending to claims that the "information had been *provided or used*" to deny em-

ployment. Pet. App. A31 (emphasis added). Moreover, the Secretary's declaration that the "most narrow reading" of the form included a waiver of ERA rights is inconsistent with his own earlier statement that the language was ambiguous. *Compare* Pet. App. A36 n.1 *with* Pet. App. A31.

As a result of his decision, the Secretary ordered Hydro to reinstate Mr. Doyle with back pay, including interest. Pet. App. A35. After additional discovery and further proceedings on the issue of remedies (*see* Pet. App. A8-A9), the Administrative Review Board issued its Final Decision and Order on May 17, 2000.[10] The Administrative Review Board awarded Mr. Doyle more than $787,000 in back pay, front pay, lost benefits, compensatory damages, attorneys' fees, and costs. It also awarded prejudgment and postjudgment interest on the back pay and front pay awards. JA 155-56; Pet. App. A3, A9. With accrued interest, the total amount of Hydro's liability under the Secretary's now-vacated decision would exceed $1 million.

On May 18, 2000, Hydro petitioned the United States Court of Appeals for the Sixth Circuit for review of the Secretary's March 30, 1994 decision on liability and the ARB's May 17, 2000 Final Decision and Order awarding damages and entering judgment. Pet. App. A9. On May 19, 2000, Mr. Doyle petitioned the United States Court of Appeals for the Third Circuit for review of the ARB's damage award. The Judicial Panel on Multidistrict Litigation ordered the petitions consolidated in the Third Circuit, and the Sixth Circuit transferred the Hydro petition to the Third Circuit, which then consolidated the two requests for review. *Id.*

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[10] In 1996, two years after the decision on liability in this case, the Secretary delegated the authority to make final decisions in ERA cases to the Administrative Review Board. *See* 61 Fed. Reg. 19978 (April 17, 1996).

In an intervening development that occurred after the Secretary's liability decision, the NRC issued a Notice of Violation to Hydro. *See* Pet. App. A57. The NRC's notice was based solely on the Secretary's ruling. *See* Pet. App. A57. The NRC did not conduct its own investigation, but simply relied on the Secretary's finding that the Authorization for Release of Information and Records effectively released any claim for illegal blacklisting. Pet. App. A58. Westinghouse Staffing Services (as Hydro's successor) denied the violation, and informed the NRC that the release in question was not intended to preclude employees from bringing claims under the ERA. In a letter dated December 26, 1995, the NRC acknowledged that WSS denied the violation and had appealed the Secretary's decision to the Third Circuit.[11] The NRC stated that it would "monitor the Third Circuit proceeding and, if the Secretary of Labor's decision is overturned, the NRC will reevaluate its enforcement action."[12]

D. The Court of Appeals' Decision

On March 27, 2002, the court of appeals granted Hydro's petition, set aside the Secretary's finding of liability, and vacated all awards of damages, remedies, fees, and costs. The court also dismissed Mr. Doyle's petition as moot. Pet. App. A3, A21-A22.

The court of appeals held that Mr. Doyle did not make out a *prima facie* case of unlawful retaliation under the ERA because his refusal to sign Hydro's authorization form did not constitute protected activity under the Act. Pet. App. A15. The court disagreed with the Secretary's conclusion that "by

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[11] Hydro filed two petitions for review before the ARB issued its final decision. The first was remanded at the request of the parties, and the second was dismissed as premature. *See* Pet. App. A8.

12/ The NRC's letter is reproduced as an appendix to the brief of the Philadelphia Area Project on Occupational Safety and Health and others, as *amici curiae* before this Court.

signing the release Doyle 'would have waived his right to file a complaint of illegal blacklisting under the ERA.'" Pet. App. A15. The court explained:

> [T]he release said nothing about waiving liability for illegal blacklisting. It merely released the enumerated organizations from liability as a "result[] of furnishing or receiving such information pursuant to this authorization."
>
> * * *
>
> The release simply did not purport to waive liability for Hydro's employment decisions or other claims Doyle might make under the ERA after Hydro received information pursuant to the authorization. It merely released potential claims for privacy infringement.

Pet. App. A15-A16. Unlike the Secretary, the court of appeals declined to construe the release "to apply to situations that by its terms it did not include." Pet. App. A16.

The court of appeals also ruled that, even if the authorization and release form were subject to a possible construction that would have included a waiver of the right to file a complaint for blacklisting, "the Secretary should not have so construed it in light of a well-recognized principle of law requiring that ambiguous documents should not be deemed illegal where capable of constructions that will validate them." Pet. App. A16. Because—as the Secretary recognized—a waiver of ERA rights would be unenforceable, the Secretary should not have construed the authorization to include a release of such rights. *Id.*

The court of appeals also held in the alternative that Mr. Doyle did not meet his burden of proving that Hydro discontinued consideration of his application for impermissible reasons. As a result, even if Mr. Doyle's refusal to sign the authorization and release form were protected under the ERA, the Secretary's decision still could not stand. The court explained that Hydro had proffered "legitimate reasons" for

refusing to hire Mr. Doyle *i.e.*, "to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened temporary employees"—and that Mr. Doyle had not offered "substantial evidence to support a conclusion that [these reasons] . . . were pretextual, as required to impose liability." Pet. App. A17. The court emphasized that the Secretary never addressed "the issue of Hydro's discriminatory intent and instead expressly limited the inquiry simply to a determination of whether [Mr. Doyle's] activities . . . were protected statutorily." Pet. App. A19 n.16. The court explained, however that a finding of discriminatory intent was required for Hydro to be held liable:

> [R]etaliation as a matter of law (and logic) does not occur unwittingly and, therefore, a finding of liability requires "an inquiry into the defendant's state of mind" to prove that "the defendant subjectively intended to discriminate against the plaintiff" on account of his engagement in protected activity.

Pet. App. A19 n.16 (quoting *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 297 (7th Cir. 1991)).

In this case, however, there was no evidence that Hydro subjectively intended to discriminate against Mr. Doyle for asserting his rights under the ERA. Like the ALJ, the court of appeals noted that Hydro had a legitimate reason to require employees to sign the release, *i.e.*, "to facilitate—without incurring liability—Hydro's assimilation of necessary and highly sensitive employee background information."[13] Pet. App. A20. There was no evidence that Hydro or its employ-

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[13] The court of appeals expressly rejected Mr. Doyle's contention (which he repeats in his petition) that Mr. Doyle already had executed two releases that would have permitted past employers to disclose Mr. Doyle's prior employment history. *See* Pet. 3. The court explained that these other forms were "not comparable to the [challenged] authorization because they concerned only an applicant's possible prior criminal record, not his full employment history." Pet. App. A21 (citing JA 261, 269).

ees read the release as waiving future claims under the ERA. Pet. App. A19 n.18. The court rejected Mr. Doyle's argument that Hydro's discriminatory intent could be inferred from the release itself, observing that "the document is facially neutral, singling out neither the ERA and any rights protected thereunder, nor Doyle individually." Pet. App. A20.

Judge Bright, sitting by designation, dissented. Pet. App. A22. In his view, a lay person "likely" would have read the form as waiving the right to bring a retaliation suit against Hydro and past employers. Pet. App. A22. He therefore viewed the release as a violation of Mr. Doyle's ERA rights. *Id.* at A23. Judge Bright did not comment on the Secretary's failure to address the question of Hydro's intent. Although Judge Bright stated that this case "is about statutory interpretation," and not "contract law" (*id.* at A22), he did not point to anything in the ERA that would allow an employer to be held liable in the absence of a finding of discriminatory intent.

ARGUMENT

The court of appeals set aside the Secretary's decision for two reasons. First, the court rejected the Secretary's construction of Hydro's standard authorization form, and—like the ALJ—held that the form did not contain a waiver of Mr. Doyle's ERA rights, but merely released potential claims for privacy infringement. Second, the court ruled that the Secretary should not have held Hydro liable because Mr. Doyle did not prove—and the Secretary did not find—that Hydro intentionally discriminated against him for exercising his rights under the ERA. The petition does not even mention this second holding, and it mischaracterizes the first in an attempt to portray the court of appeals' decision as controversial, and worthy of review by this Court.

Far from announcing some novel rule of law that conflicts with other cases or will have wide-ranging implications, the

court of appeals decided this case on its reading of the specific language contained in Hydro's authorization form. It did not, as the petition claims, "legalize" prospective waivers of ERA rights, but merely held that this particular authorization form did not contain such a waiver.

In addition, Mr. Doyle's failure to prove that Hydro acted with discriminatory intent supplied an independent ground for the court of appeals' decision, and the petition does not challenge that aspect of the court of appeals' ruling. "Discriminatory intent" is an element of any alleged violation of Section 210 of the ERA, and the Secretary never even addressed the issue, much less made any finding that Hydro harbored the requisite wrongful intent. The Secretary's failure to make such a finding alone compelled the court of appeals to set aside his liability decision. More fundamentally, however, the record contains no evidence from which a reasonable fact finder could find discriminatory intent on Hydro's part. Under these circumstances, regardless of petitioner's or the Secretary's construction of the facially neutral authorization and release form, no liability would attach to Hydro.

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS OF APPEALS

The court of appeals narrowly tailored its decision to the facts of this case, and did not announce any novel legal principle of general application. Notwithstanding the court's limited holding, Mr. Doyle purports to discern a "clear and unequivocal split among the circuits." He reaches this conclusion, however, only by distorting both the decision below and the holdings of the cases with which it allegedly conflicts.

A. The Question Whether a Prospective Employee May Be Required to Waive Substantive Rights as a Condition of Employment Is Not Presented in this Case.

Mr. Doyle asserts that the decision below conflicts with decisions of other circuits, which he claims stand for the general proposition that any prospective waiver of any substantive right, proffered as a condition of employment, is illegal. Pet. 14-16, 20-21. As explained below, however, the court of appeals did not condone such agreements. Nor do the decisions of other courts condemn such agreements in terms as broad as those set forth in the petition.

The principal flaw in the petition is its repeated insistence that the court of appeals somehow condoned, or, as the petition puts it, "legalized," the practice of conditioning employment offers on the prospective employees' agreement to waive important "substantive rights," such as the employee protection provisions of the ERA. *See, e.g.*, Pet. 14, 16, 20-21, 26. This is a complete distortion of the court's decision. The court of appeals—like the ALJ—concluded that the authorization form *did not even purport to waive* an applicant's rights under the ERA. Pet. App. A15-A16; *id.* at A43-A44. Rather, the court properly viewed the form as relating solely to applicants' privacy rights. Moreover, as Mr. Doyle acknowledges elsewhere in the petition, the court of appeals clearly stated that pre-employment waivers of ERA rights are not enforceable. *See* Pet. 16, 18, 19. Indeed, the court referred to such waivers as "illegal release[s]." Pet. App. A16.

Mr. Doyle's claim that the decision below conflicts with *Connecticut Light & Power Company v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996) ("*CL&P*"), therefore misses the point. Pet. 14-15, 22-24. According to Mr. Doyle, *CL&P* forbade employers from requesting that an employee "prospectively waive his or her ERA rights." Pet. 24. That case

is readily distinguishable. The employers there proposed to settle a lawsuit by an agreement that prevented the employee from "voluntarily appear[ing] as a witness or a party in any judicial or administrative proceeding" in which either of the defendants or any of their affiliates was a party. 85 F.3d at 91 n.1.[14] The Secretary of Labor found that these "gag" provisions in the proffered settlement agreement were "intended to deprive [the employee] of his participation rights under the ERA." *Id.* at 93. The court of appeals agreed, noting that the settlement agreement had the objective of "keeping [the] employee quiet." *Id.* at 95.

Unlike *CL&P*, this case does not involve an employer's attempt to "restrict an employee's ability to cooperate with administrative and judicial bodies." *See* 85 F.3d at 94. On the contrary, the court of appeals ruled that the Authorization for Release of Information and Records could not reasonably be read to waive Mr. Doyle's ERA rights. Pet. App. A15-A16, A19 n.16. Thus, in the view of the court of appeals, Mr. Doyle was not even *asked* to waive his rights. The court's decision therefore cannot create a division among the circuits regarding the legality of such a request.

Because the court of appeals did not hold that pre-employment waivers of ERA rights are enforceable, or even that it is permissible to request such a waiver, its decision cannot be construed as "legalizing" waivers of ERA rights. Moreover, even if the opinion could be read as implicitly condoning pre-employment waivers of other rights—such as Privacy Act rights where important security considerations require thorough background checks—the decision would not conflict with any of the cases cited in the petition. Although Mr.

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[14] The agreement also provided that the employee would not "do anything to encourage, suggest or otherwise induce any other party, attorney, administrative agency, or administrative or judicial tribunal to contact, involve, or call [the employee] as a witness or to join [him] as a party in such proceeding." *Id.*

Doyle asserts that "[t]his Court has repeatedly held that it is unlawful for an employer to require a prospective employee to prospectively waive statutory rights as a condition of employment," none of the cases that he cites supports such a blanket rule. Pet. 15.

For example, Mr. Doyle cites *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), as prohibiting pre-employment waivers of "substantive rights." Pet. 15. The case involved the enforceability of a release of minimum wage and maximum hour rights under the Fair Labor Standards Act. Far from establishing a broad prohibition against waivers of "substantive rights," the Court explained that whether a particular statutory right may be waived depends on the intention of Congress in passing the statute. *Id.* at 705, 707.[15]

Circuit City and *Gilmer*—both of which enforced pre-employment agreements to arbitrate disputes—are even further afield. In *Circuit City*, the Court merely noted that, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). *Gilmer* made the same statement in the context of discussing the arbitrability of disputes arising under specific statutes. 500 U.S. at 26 (discussing the arbitrability of claims under, *e.g.*, the Sherman Act, the Securities Exchange Act of 1934, and RICO). Neither of these cases held, as Mr. Doyle claims, that "it is unlawful for an employer to require a prospective employee to prospectively waive substantive statutory rights as a condition of employment." Pet. 15.

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[15] Similarly, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), stated that "an employee's rights under Title VII may not be waived prospectively." But it did not purport to assess whether other statutory rights could be waived.

The only case cited in the petition that even arguably involves an attempt by an employer to condition an offer of employment on a waiver of substantive rights is *Secretary of Labor v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989). That case, which arose under the Mine Safety and Health Act, involved an employer that already had fired an electrician in retaliation for his refusal to disconnect equipment safety features. The employer then offered to reinstate the employee, but only if he agreed to work under the same unsafe conditions and to refrain from raising any additional safety concerns. *Id.* at 1450 & n.5. The court characterized the offer of reinstatement as one conditioned on the electrician's "willingness to work under dangerous conditions of which [he] ha[d] previously complained." *Id.* at 1452.

Mr. Doyle's claim that "*Mullins* is very similar to this case" is baffling. Pet. 21. Hydro did not condition its offer of employment on Mr. Doyle's willingness to work in an unsafe environment, and nothing in the court of appeals' decision can be read as condoning such an offer. Moreover, no one at Hydro instructed Mr. Doyle to refrain from reporting any safety concerns that he might encounter at the D. C. Cook plant. Even Mr. Doyle does not suggest that the authorization and release form could be construed to include a waiver of protection for *future* whistleblowing incidents. The court of appeals' decision therefore does not conflict with *Mullins* in the slightest.

In short, Mr. Doyle substantially overstates the governing law when he asserts that pre-employment waivers of "substantive rights" are uniformly unlawful. As *Brooklyn Savings Bank* recognized, the determination whether a particular statutory right may be waived must be made on a case-by-case basis depending on congressional intent. 329 U.S. at 705. The court of appeals construed the Authorization for Release of Information and Records as only releasing claims related to privacy infringement. Pet. App. A15-A16. Mr. Doyle has not argued, and he has cited no case holding, that

statutory or common law privacy rights may not be waived. Indeed, such waivers have been held to be effective affirmative defenses to Privacy Act claims arising from the provision of information to a prospective employer. *See National Treasury Employees Union v. Internal Revenue Service*, 601 F. Supp. 1268, 1273 (D.D.C. 1985) (holding that employee's release of "any . . . Agency from any liability arising from [prospective employer's] investigation and verification" of his record with former employers was affirmative defense sufficient to preclude IRS liability under Privacy Act for disseminating records to prospective employer).

B. The Secretary's Interpretation of the Authorization and Release Form Was Not Based on Any Statutory Construction of the ERA and Was Not Entitled to Deference from the Court of Appeals.

Petitioner contends that the court of appeals improperly failed to defer to the Secretary's determination regarding the "scope of protected activity" under the ERA. Pet. 24-25. Contrary to Mr. Doyle's assertion, however, the court of appeals' ruling was not based on an interpretation of the provisions of the ERA. The court expressly acknowledged that it is appropriate to "pay deference to the Secretary in construing the statutes he is charged with administering." Pet. App. A10 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). At the same time, however, the court correctly recognized that the Secretary overturned the ALJ's liability ruling not because of some difference regarding the proper reading of the ERA but because the Secretary did not share the ALJ's view regarding the meaning of the authorization and release form. As to the latter issue, the Secretary had no special expertise, and his conclusions about the meaning of Hydro's form were not entitled to any more deference than the Secretary himself gave the ALJ.

In an effort to characterize the Secretary's decision as resting on a question of statutory interpretation, the petition contends that "it is clear that the Secretary interpreted the ERA to find that, if an employee reasonably *believes* that he is being asked to prospectively waive his rights and refuses to do so, that *refusal* is protected activity, regardless of whether the proffered agreement is legally enforceable or not."[16] Pet. 25. In fact, the Secretary said nothing of the kind. The Secretary read the authorization form as waiving Mr. Doyle's right to pursue ERA claims. He did not address whether Mr. Doyle's refusal to sign the form would have been protected if Mr. Doyle *erroneously* believed that it extended to ERA claims.

The court of appeals did not decline to defer to the Secretary's interpretation of the "scope of protected activity" under the ERA. The court simply rejected the Secretary's conclusion that Hydro's form waived Mr. Doyle's right to complain about illegal blacklisting. Pet. App. A15-A17 & n.14. Neither the Secretary's Final Decision and Order nor the court of appeals' opinion suggests that the Secretary's construction of the form was based on an interpretation of the ERA itself. Because the Secretary's construction was based on his reading of the language of the release, and not on an interpretation of the statute, the court of appeals owed that

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[16] Here and elsewhere in the petition, Mr. Doyle mischaracterizes the court of appeals' decision by suggesting that the only basis for the court's conclusion that the authorization form did not apply to ERA rights was that it would be unenforceable if it did. *See* Pet. 16, 18, 19, 28. This is not even a plausible reading of the court's opinion, which made it abundantly clear that, by its terms, the authorization form did not relate to ERA rights at all but merely released potential claims for privacy infringement. Pet. App. A15-A16. The court mentioned only in passing that waivers of ERA rights are unenforceable, noting that *even if* the release could be construed to waive ERA rights—which the court concluded it could not—the waiver should not, as a matter of contract construction, be interpreted as doing so. Pet. App. A16.

construction "no more deference than [it] would any lower court's analysis of law." *See, e.g., Thomas Hodgson & Sons, Inc. v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995) (FERC's conclusion that it had jurisdiction over operation of hydro-electric plant on nonnaviagable river was not entitled to deference because FERC's order was based on its reading of judicial precedent, not the Federal Power Act); *Blackburn v. Reich*, 79 F.3d 1375, 1377 n.3 (4th Cir. 1996) (Secretary of Labor's ruling that he lacked authority under ERA to award attorneys' fees for proceedings before court of appeals was not entitled to deference because it was based on Secretary's reading of judicial precedent, not his interpretation of the statute).

Relying on *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975), the petition also claims that the court of appeals was required to follow Mr. Doyle's reading of the release. Pet. 18, *see id.* at 16, 19. Contrary to Mr. Doyle's suggestion, however, the situation in *Maxey's Yamaha* was very different from the one presented here. The case does not stand for the proposition that reviewing courts must apply a "reasonable employee" standard in construing pre-employment contracts such as the release at issue in this case. In fact, *Maxey's Yamaha* did not entail the construction of any contract at all, much less set forth a general principle about how such contracts should be construed. Rather, the case involved an employer that, following a Department of Labor investigation under the Fair Labor Standards Act, was directed by the government to pay back wages to several of its employees. The employer, allegedly short of funds, issued checks to the employees involved but then asked that the employees endorse the checks back to the company, apparently on the understanding that the amounts at issue would be repaid to the employees at a later date. One of the employees balked and asserted her right immediately to receive the back wages owed. The employer then fired this employee. The court of appeals ruled that the discharge was unlawful

because it was motivated at least in part by the employee's assertion of her statutory rights. 513 F.3d at 180-83. The case had nothing to do with any pre-employment screening of potential employees, and no contractual waiver was involved.

The court of appeals' decision in the present case was not based on a disagreement with the Secretary's interpretation of the "scope of protected activity" under the ERA. Rather, the court of appeals rejected the Secretary's erroneous conclusion regarding the meaning of the authorization form that Mr. Doyle was asked to sign. Pet. App. A15, A16-A17. This conclusion was not entitled to deference, *see Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997), particularly where (as in this case) the Secretary rejected the ALJ's contrary interpretation without explanation.[17]

II. THE SECRETARY'S FAILURE TO ADDRESS THE QUESTION OF DISCRIMINATORY INTENT, AND PETITIONER'S FAILURE TO ADDUCE EVIDENCE OF SUCH INTENT, PROVIDE AN INDEPENDENT GROUND FOR THE COURT OF APPEALS' DECISION

Finally, the petition does not even mention, much less challenge, the court of appeals' holding that the Secretary should not have held Hydro liable in the absence of a finding

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[17] *See Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (where Secretary and ALJ disagree, Secretary's decision is reviewed "more critically," to "ensure . . . that the Secretary's conclusion . . . is supported by articulate, cogent, and reliable analysis") (internal citations and quotation marks omitted); *Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 894 (3d Cir. 1997) ("[W]here, as here, the Board has reversed a Hearing Officer's findings in its decision, the Board must offer some explanation for the reversal before the court of appeals will defer to its determinations."); *Citizens State Bank of Marshfield v. FDIC*, 718 F.2d 1440, 1444 (8th Cir. 1983) ("The Board's departure from the ALJ's findings is vulnerable if it fails to reflect attentive consideration to the ALJ's decision.").

of discriminatory intent. The Secretary's failure to make such a finding, and Mr. Doyle's failure to submit the necessary proof of intent, required that the Secretary's liability ruling be set aside. As the court of appeals explained:

> There is a second, independent reason why we are constrained to grant Hydro's petition and set aside the decision and order of the ARB. Accepting *arguendo* that Doyle established a prima facie case, he has not offered substantial evidence to support a conclusion that Hydro's proffered legitimate reasons for refusing to hire him without his signing the authorization with the release—namely, to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened temporary employees—were pretextual, as required to impose liability.

Pet. App. A17. As this Court has held, once the employer in a discrimination case provides a legitimate, non-discriminatory reason for the adverse employment action, the burden shifts to the complainant to prove by a preponderance of the evidence that the employer's explanation was merely a pretext for a true motive of discriminating on the basis of a protected trait. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08, 515-16 (1993). This burden-shifting framework has been applied to ERA cases. *See* Pet. App. A13.

In this case, the court of appeals held that "Doyle simply did not meet that burden." Pet. App. A18. The petition does not mention, much less seek review of, this alternative holding. Any decision that this Court might render on the questions Mr. Doyle claims are presented here thus would not alter the disposition of the case. *See Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (where there is an alternative and independent basis for decision by courts below, any opinion issued by this Court on question presented would be purely advisory); *District of Columbia v. Barry*, 387 F.2d

860, 861-62 (D.C. Cir. 1967) (where review was sought as to only one of several grounds for dismissing indictment, any decision the court might issue could not affect rights of litigants before it and thus would constitute advisory opinion); *see also Glover v. United States*, 531 U.S. 198, 205 (2001) (the Court generally does not decide issues outside the questions presented in the petition); Sup. Ct. R. 14.1(a) (same).

Moreover, even if the Court were to reach out to consider the unchallenged alternative holding, the court of appeals' decision is plainly correct and consistent with prior law. It is well settled that the ERA and similar whistleblower statutes require proof of discriminatory intent by the employer.[18] In this case, the Secretary did not find that Hydro intended to discriminate against Mr. Doyle when it required him to sign its standard authorization form. Indeed, as the court of appeals correctly observed, the Secretary never addressed the issue of Hydro's intent at all.[19] Pet. App. A19 n.16. In

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[18] *See, e.g., Williams v. Lockheed Martin Corp.*, Nos. 98-ERA-40, 98-ERA-42, 2000 DOL Ad. Rev. Bd. LEXIS 103, at *11 (Sept. 29, 2000) (dismissing complaints under ERA and other whistleblower laws where ALJ correctly held that "there [was] no discriminatory intent evidenced by the established facts"); *Scott v. Alyeska Pipeline Service Co.*, No. 92-TSC-2, 1995 DOL Sec. Labor LEXIS 152, at *8 (July 25, 1995) (explaining that four environmental whistleblower laws, like the ERA, "require proof of intent by the employer to discriminate against an employee 'because' or 'by reason of the fact that' the employee engaged in protected activities"); *Dysert v. Westinghouse Elec. Corp.*, No. 86-ERA-39, 1991 DOL Sec. Labor LEXIS 72 at *5 (Oct. 30, 1991) (complainant must prove that retaliation for protected activities was a motivating factor in the decision to take the adverse action); *Lockert v. United States Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989) (employer's decision must be motivated by "retaliatory animus" to violate the ERA).

[19] The sweeping statements made in the *amicus* briefs regarding what the form was intended or "designed" to do are completely unfounded. *See, e.g.*, Brief of *Amici Curiae* Philadelphia Area Project on Occupational Safety and Health, *et al.* [hereinafter "PHILAPOSH Br."] at 5

addition, the court correctly rejected Mr. Doyle's argument that the necessary discriminatory intent could be inferred from the language of the authorization form, observing that "the document is facially neutral, singling out neither the ERA and any rights protected thereunder, nor Doyle individually." Pet. App. A20. As a result, this case is easily distinguishable from other decisions involving employment policies that explicitly discriminate on the basis of some protected trait. Pet. App. A20 & n.19.

In short, there is no evidence that Hydro harbored the necessary discriminatory intent. Like Hydro, the ALJ and the court of appeals interpreted the release as waiving claims related to privacy rights only, not claims for alleged blacklisting under the ERA. Even the Secretary concluded that the language used in the release was at least ambiguous. Any finding of intent that the Secretary might have made, therefore, would have been unsupported by substantial evidence.

Because there was no finding or evidence of the necessary discriminatory intent, this case is quite different from *Maxey's Yamaha*, in which the employee's discharge was based directly on her insistence that she receive immediately the back wages due under the FLSA. Here, as the court of appeals held, Mr. Doyle never proved, and the Secretary never found, that the "immediate cause" or "motivating

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("The HNS release is designed to intimidate HNS workers."); Brief of *Amici Curiae* Northwest Environmental Advocates at 6-7 (suggesting that the release was designed as a "test" to see if prospective employees were willing "to abandon legal claims of retaliation against their past employers"). Similarly, the *amici*'s speculation regarding the potential misuse of similar waivers by employers who might attempt to smoke out whistleblowers in the employment screening process lacks any basis in the record of this case. *See, e.g.*, PHILAPOSH Br. 8, 15. Nothing in the court of appeals' opinion can be construed as sanctioning use of pre-employment waivers *for the purpose of* identifying whistleblowers in order to deny them employment.

factor" behind Hydro's decision not to hire Mr. Doyle was that Mr. Doyle asserted his statutory rights under the ERA. Pet. App. A18. On the contrary, Hydro declined to hire Mr. Doyle because he refused to sign its standard authorization form, which was intended to enable Hydro "to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened temporary employees." Pet. App. A17. The court of appeals correctly ruled that Mr. Doyle did not meet his burden of proving that this legitimate, nondiscriminatory basis for Hydro's employment decision was merely a pretext for unlawful discrimination. Pet. App. A17-A18.

The court of appeals' decision to set aside the Secretary's finding of liability was thus appropriate regardless of the applicable standard of review. There is no room for disagreement that—as both the Secretary and the ARB have held on numerous occasions—intent is a necessary element of a claim under Section 210 that the complainant must prove by a preponderance of the evidence in order to prevail. No amount of deference will permit an agency simply to ignore an essential element of the statute that it is charged with enforcing.[20] The Secretary's failure to make a finding of intent in this case was thus reversible error under any standard.

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[20] *See Garcia v. Sec'y of Labor*, 10 F.3d 276, 279 (5th Cir. 1993) (Secretary's interpretation of Migrant and Seasonal Agricultural Worker Protection Act, which "effectively read[] out the 'with knowledge' requirement" of statute prohibiting employment of illegal aliens, frustrated the clear intent of Congress, and was not entitled to deference).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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